

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRUCE KEITHLY and DONOVAN LEE,
Individually and on Behalf of all Others
Similarly Situated,

Interim Lead Plaintiffs,

v.

INTELIUS, INC., A Delaware Corporation; and
INTELIUS SALES, LLC, A Nevada Limited
Liability Company,

Defendants

v.

ADAPTIVE MARKETING, LLC, a Delaware
Limited Liability Company,

Third Party Defendant.

No. C09-1485RSL

PLAINTIFFS' MOTION TO AMEND
COMPLAINT

Noted for Consideration:
February 25, 2011

I. INTRODUCTION

Plaintiffs seek to amend their Complaint to add breach of contract claims. This is Plaintiffs' first motion to amend the consolidated complaint in this case, and is made within the deadline to amend the pleadings. This amendment is made in good faith, with no undue delay, no prejudice to Defendants, and is not futile. Accordingly, Plaintiffs respectfully submit that the amendment should be made as a matter of course. A copy of the proposed Second Amended Complaint is attached as Exhibit B to the Declaration of Karin Swope, filed herewith.

II. PROCEDURAL BACKGROUND

Plaintiffs Bruce Keithly, Donovan Lee and Edith Cramer (the “*Keithly* Plaintiffs”) filed a class action suit on October 19, 2009 against Intelius, Inc. and Intelius Sales, LLC (collectively “Intelius”). The *Keithly* Plaintiffs allege that Intelius systematically deceived customers into paying for monthly subscriptions that they did not knowingly purchase. The complaint states claims for violations of the Washington Consumer Protection Act (“Washington CPA”), RCW Ch. 19.86, *et. seq.*, and for declaratory relief under 28 U.S.C. § 2201. On March 24, 2010, Matthew Bebbington filed a second case in this district against Intelius, *Bebbington v. Intelius, Inc.*, No. 10-0500-RSL. On May 28, 2010, the Court entered a Consolidation Order, appointing the *Keithly* and *Bebbington* plaintiffs as Interim Lead Plaintiffs and appointing Cohen Milstein Sellers & Toll, PLLC and Keller Rohrbach L.L.P. as Interim Lead Counsel (Dkt. #59). On June 2, 2010, Laurence Paskowitz filed a third lawsuit against Intelius and Adaptive Marketing LLC in this District Court. *See Paskowitz v. Intelius, Inc.*, No. 10-00909-MAT, including the above claims, and adding claims of unjust enrichment and violations of the Stored Communications Act.

These three separate actions, and the claims plead therein, were consolidated into one Amended Consolidated Complaint, which Lead Plaintiffs filed on July 22, 2010 (Dkt. #68). While Plaintiffs have filed amended complaints to consolidate the three separate causes of actions, they have not moved to amend a complaint in the consolidated case. The deadline to amend pleadings is February 10, 2011 (Dkt. #44). Plaintiffs are amending the complaint in two respects: (1) to conform the class period and definition to the discovery produced by Intelius to date; (2) to present contract claims based upon Intelius’s Terms and Conditions and Privacy Policy.¹

¹ The fact that the amended complaint includes some dismissed claims does not mean that Plaintiffs intend to re-litigate the issues decided in the Court’s Order of February 8, 2011, but only reflects the fact that Plaintiffs want to preserve some issues for any potential appeal.

1 Defendants will have ample opportunity to conduct further discovery as necessary. The
 2 discovery cut-off is September 11, 2011, and trial is not scheduled until February 2, 2012 – an
 3 entire year away. Plaintiffs have asked Intelius to stipulate to the amendments both in writing
 4 and telephone. Intelius declined to stipulate. Declaration of Karin Swope, ¶ 2.

5 **III. ARGUMENT**

6 “A party may amend its pleading only with the opposing party’s written consent or the
 7 court’s leave. The court should freely give leave when justice so requires.” Fed. R. Civ. P.
 8 15(a)(2). Leave to amend should be granted absent some justification for refusal. *Forman v.*
 9 *Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed .2d 222 (1962). If the plaintiff requests
 10 leave to amend, such leave should be granted with “extreme liberality.” *Morongo Band of*
 11 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990). “There is, therefore, a ‘strong
 12 policy in favor of allowing amendment’ after ‘considering four factors: bad faith, undue delay,
 13 prejudice to the opposing party, and the futility of amendment.” *Interscope Records v.*
 14 *Leadbetter, Slip Copy*, 2006 WL 1288440 *1 (W.D. Wash. 2006) (citing *Kaplan v. Rose*, 49 F.3d
 15 1364, 1370 (9th Cir. 1994)). A motion for leave to amend is to be considered “with all
 16 inferences in favor of granting the motion.” *Griggs v. Pace Am. Grp., Inc.*, 170 F.3d 877, 880
 17 (9th Cir. 1999); Fed. R. Civ. P. 15(a) (noting that leave to amend a pleading ‘shall be freely
 18 given when justice so requires’); *DCD Programs v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987)
 19 (noting that the policy favoring amendment “should be applied with ‘extreme liberality’”).

20 This is Plaintiffs’ first motion to amend the consolidated complaint. The addition of the
 21 breach of contract claims is not made in bad faith, nor with undue delay. This amendment is
 22 made one day following the receipt of Court’s Order on Defendant’s Motion for Judgment on the
 23 Pleadings, which provides the law of the case, as well as explanation and guidance on the scope
 24 of the lawsuit.

25 The amendment does not prejudice Intelius because it will cause absolutely no change to
 26 the scope of discovery. The breach of contract claims do not expand the scope of discovery that

1 already exists under Plaintiffs' unjust enrichment and Washington Consumer Protection Act
2 claims. In any event, even if additional discovery were required to prove these claims, the
3 parties have ample opportunity to do so given that the discovery cut-off deadline is not until
4 September 11, 2011, and the deadline for filing dispositive motions is not until October 11, 2011.
5 Defendants will not be prejudiced by the amendment.

6 Additionally, the amendment would not be futile. The Court's February 8, 2011 Order
7 Granting In Part Intelius' Motion For Judgment on the Pleadings states, "[w]hile plaintiffs may
8 have a contractual right to the protections of the CPA, the breach of that right would result in a
9 breach of contract claim, not a direct claim under a statute that does not, by its terms, apply."
10 Order at page 20, n. 13 (Dkt. 110). Amending the complaint at this stage to include an additional
11 legal theory for relief based on evidence that is already being collected would not be futile.

12 Plaintiffs also have updated the class period to conform to the evidence produced by
13 Intelius to date. Such amendment is arguably allowable pursuant to Rule 23 at class
14 certification, and need not be the subject of this motion to amend the complaint. In any event,
15 such amendment would not prejudice Intelius because Plaintiffs have previously put Intelius on
16 notice of their intention to amend the class period to the beginning of Intelius' in-cart marketing
17 practices. The current beginning of the class period in the consolidated complaint of July 17,
18 2007 was based on the date Intelius entered into its post-transaction marketing agreement with
19 Adaptive. The Court's February 10, 2010 Order permits claims on Intelius' in-cart marketing,
20 which may predate the July 2007 Marketing Agreement. Thus the change in the class period
21 merely conforms to the legal claims and evidence in this case, and would not be futile.

22 IV. CONCLUSION

23 Based on the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs leave
24 to file the Second Amended Consolidated Complaint.
25
26

1 DATED this 10th day of February, 2011.

2
3 By /s/ Karin B. Swope

4 Mark A. Griffin, WSBA #16296
5 Karin B. Swope, WSBA #24015
6 David J. Ko, WSBA #38299
7 1201 Third Avenue, Suite 3200
8 KELLER ROHRBACK L.L.P.
9 Seattle, WA 98101
10 Telephone: (206) 623-1900
11 Facsimile: (206) 623-3384

12 *Interim Co-Lead Counsel for Interim Lead*
13 *Plaintiffs*

14 Andrew N. Friedman
15 Victoria S. Nugent
16 Whitney R. Case
17 COHEN MILSTEIN SELLERS & TOLL
18 P.L.L.C.
19 1100 New York Avenue, N.W., Suite 500 West
20 Washington, DC 20005-3964
21 Telephone: (202) 408-4600
22 Facsimile: (202) 408-4699

23 *Interim Co-Lead Counsel for Interim Lead*
24 *Plaintiffs*

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2011, I caused to be served a true and correct copy of PLAINTIFFS' MOTION TO AMEND COMPLAINT on the following recipients via the method indicated:

Arthur W. Harrigan, Jr., WSBA #1751
Tyler Farmer, WSBA #39912
DANIELSON HARRIGAN LEYH &
TOLLEFSON, LLP
999 Third Avenue, Suite 4400
Seattle, Washington 98104
Telephone: (206) 623-1700

☒ Via ECF
☐ Via Hand Delivery
☐ Via U.S. First Class Mail
☐ Via facsimile to (206) 623-8717
☐ Via email to:
arthurw@dhlt.com; and
tylerf@dhlt.com

*Attorneys for Intelius, Inc and
Intelius Sales, LLC*

Cori Gordon Moore, WSBA #28649
Thomas L. Boeder, WSBA #408
PERKINS COIE LLP
1201 Third Avenue, 40th Floor
Seattle, Washington 98101

☒ Via ECF
☐ Via Hand Delivery
☐ Via U.S. First Class Mail
☐ Via facsimile to (206) 359-3849
☐ Via email to:
cgmoore@perkinscoie.com
tboeder@perkinscoie.com

Attorneys for Adaptive Marketing LLC

DATED this 10th day of February, 2011.

s/Karin B. Swope
Karin B. Swope